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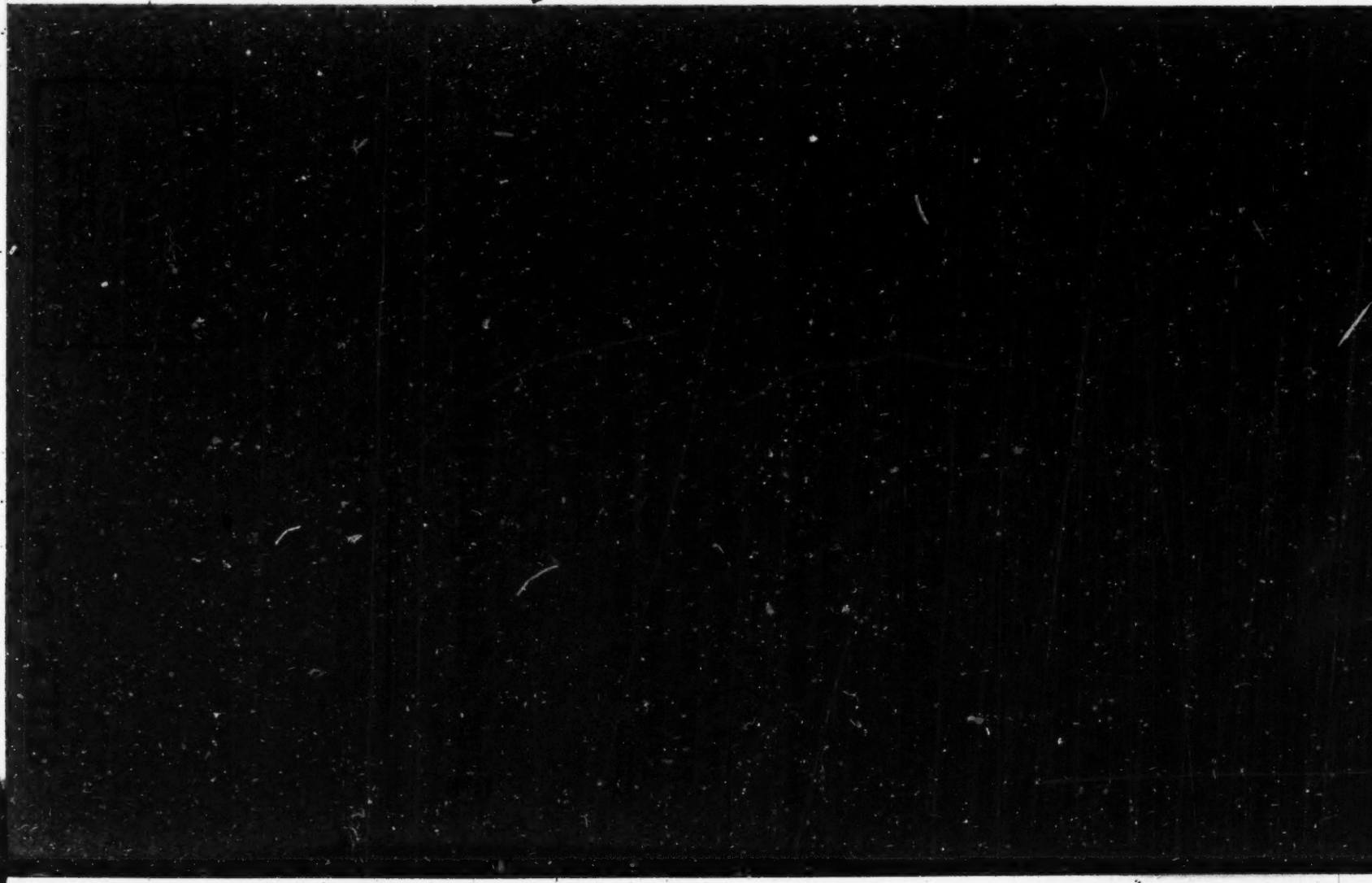

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# In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 75

ROBERT H. JACKSON, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES, AND AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, PETITIONER

*v.*

IRVING TRUST COMPANY, AS EXECUTOR OF HERMANN SIELCKEN, DECEASED, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the District Court (R. 1074–1092) is reported in 27 F. Supp. 44. The opinion of the Circuit Court of Appeals for the Second Circuit (R. 1118–1126) is reported in 109 F. (2d) 714.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 7, 1940 (R. 1126–1127). The

petition for a writ of certiorari was filed on May 11, 1940, and was granted on June 3, 1940. The jurisdiction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## QUESTIONS PRESENTED

Whether an unappealed judgment against the Alien Property Custodian under Section 9 (a) of the Trading with the Enemy Act, on a claim to recover for a debt, may be set aside for want of jurisdiction on the ground that the beneficial owner of the claim sued on was an "enemy," as defined by that Act.

## STATUTES INVOLVED

The pertinent portions of the Trading with the Enemy Act are set forth in the Appendix, *infra*, pp. 51–53.

## STATEMENT

The firm of Crossman & Sielcken was a partnership, engaged in the export business, having its principal place of business in New York. It consisted of Sielcken, Sorenson, and Nielsen, all naturalized citizens of the United States (R. 152, 362, 509, 593, 808). The entire capital of the partnership belonged to Sielcken (R. 60, 806–7), the interests of Sorenson and Nielsen being limited to a percentage of the net profits (R. 60, 806–7). The articles of partnership provided that upon the death of Sielcken "it shall be the duty of the surviving partners to transfer and pay over to the

executor of the will of the deceased partner his capital * * * and also all the property and business of the firm" (R. 62, 807). Sielcken died in Germany on October 8, 1917, after having lived there continuously since 1914 (R. 9, 299, 814). Respondent is the American executor of Sielcken's estate (R. 299–300).

*The original action.*—In 1927, Sorenson and Nielsen, "as the surviving partners of the firm of Crossman & Sielcken," brought suit against the Alien Property Custodian and the Treasurer of the United States in the United States District Court for the Southern District of New York under Section 9 (a) of the Trading with the Enemy Act (R. 19, 318).[1] The bill of complaint alleged that a debt was due the partnership of Crossman & Sielcken by Zentral Einkaufs-Gesellschaft, m. b. H. (hereinafter referred to as "Z. E. G."), a German corporation acting as official purchasing agent for the Imperial German Government (R. 319–320). It was alleged that the debt was for certain cargoes purchased during 1915 by Crossman & Sielcken for Z. E. G. and its predecessor purchasing agency, and consigned to neutral ports, which had been seized and condemned by the British. The bill declared that the Alien Property Custodian and the Treasurer of the United States

[1] A notice of claim, pursuant to the requirements of Section 9 (a), had previously been filed with the Alien Property Custodian (R. 18, 147) and this the bill alleged (R. 322).

held certain assets of Z. E. G. which had been seized under the provisions of the Trading with the Enemy Act (R. 322), and prayed that these assets be paid to plaintiffs in satisfaction of the debt owing by Z. E. G. to Crossman & Sielcken (R. 322–323). Sorenson and Nielsen alleged that they were the surviving partners of Crossman & Sielcken, which continued, in accordance with Section 61 of the Partnership Law of New York, for the purpose of winding up its affairs, and that the suit was brought pursuant to such purpose (R. 322).

The Alien Property Custodian and the Treasurer of the United States moved to dismiss on the grounds that it appeared on the face of the bill (a) that no debt was owing to the plaintiffs from any enemy whose property had been seized and was being held, (b) that no debt was owing by Z. E. G., and (c) that the plaintiffs had not stated facts sufficient to entitle them to equitable relief under the Trading with the Enemy Act (R. 337–338). These defendants also filed an answer which for the most part denied any knowledge as to the material averments concerning the transactions alleged to have given rise to the debt (R. 338–339), and set up as an affirmative defense prior claims to the seized funds of Z. E. G. (R. 340–341).

Z. E. G., which was joined as a defendant, filed an answer denying certain material averments of the claim and setting up nine affirmative defenses.

The first four alleged that the cargoes had been seized prior to arrival at the neutral ports to which they had been consigned, and that no debt was owing because title did not pass and payment was not to be made until the goods were received (R. 326–328). The sixth and seventh defenses averred that the non-liability of Z. E. G. had been conclusively determined by arbitration in Germany (R. 329–330). In support of this defense, Z. E. G. alleged that the partnership of Crossman & Sielcken had been dissolved by the outbreak of the war on April 6, 1917 by reason of the fact that Sielcken was then residing in Germany, and became an enemy. It was alleged that the claim thereupon passed to Sielcken and upon his death to his German executors, who entered into an arbitration agreement with Z. E. G.; and that the arbitrators had found that there was no liability on the part of Z. E. G. in respect of the seized shipments. The other affirmative defenses are not material here.[2]

After a trial in which the main burden of defense was borne by counsel for Z. E. G. (R. 393, 804,

[2] The fifth defense asserted that the plaintiffs did not have title to the alleged cause of action since the Alien Property Custodian was alleged to have seized all the assets of Crossman & Sielcken in October 1917, because Sielcken was an enemy (R. 328–329). This defense was never mentioned at the hearing or in the opinion of the District Court. The eighth and ninth affirmative defenses averred that another firm had had a half interest in the shipments (R. 331–332). At the trial, counsel for Z. E. G. indicated his disinclination to press these defenses (R. 801).

1004, 1006, 1022–3), the District Court held that the risk of loss of the cargoes rested with Z. E. G. and its predecessor (R. 865). It further held that the partnership was not dissolved by the outbreak of war, so that the claim against Z. E. G. did not pass to Sielcken before his death and his German executors had no power to submit the claim to arbitration (R. 852–854, 865). The court ruled that, even though Sielcken was an "enemy" under the Trading with the Enemy Act, he did not thereby become an enemy under the common law doctrine that a partnership with an enemy is dissolved by the outbreak of war (R. 852–853, 855–856). Accordingly it found that Z. E. G. was indebted to the plaintiffs, and entered judgment against the Alien Property Custodian and the Treasurer of the United States in the sum of $716,160.37 (R. 351–352). This judgment was duly paid (R. 1071–1072).[3]

As will be fully demonstrated in the argument, the sole question actually litigated in the 1929 proceeding was whether any debt was owing from Z. E. G. No issue was raised at the trial, and no determination was made by the District Court, as to

[3] In a separate action in the Supreme Court of the State of New York, to which the Government was not a party, it was determined, in 1933, that respondent, Sielcken's American executor, had the sole right to liquidate the partnership, that neither Sorenson nor Nielsen had been a liquidating partner, and that neither was entitled to any part of the proceeds of the recovery from the Alien Property Custodian (R. 35–37, 238–251, 263–264).

whether the court was without jurisdiction of the suit because Section 9 (a) of the Trading with the Enemy Act expressly limited the right to sue to a person "not an enemy" and Sielcken, whose estate would be the sole beneficiary of any recovery, was an "enemy" as defined in the Act.

*The present motion.*—In 1938, the United States moved to set aside the 1929 judgment on the ground that the District Court had been without jurisdiction. The Attorney General of the United States, as successor to the Alien Property Custodian, subsequently appeared as moving party in behalf of the United States. In support of the motion it was pointed out that the estate of Sielcken was the sole beneficial owner of the claim, that Sielcken was an enemy under Section 2 of the Trading with the Enemy Act, and that the suit by Sorenson and Nielsen, as liquidating partners, was merely a suit for the benefit of Sielcken's estate. The Irving Trust Company, the American executor of Sielcken's estate, was permitted to intervene, and numerous documents and affidavits were filed in support of and in opposition to the motion.[4] The

[4] These affidavits and documents disclose substantial evidence of collusion and possibly of fraud. Thus it appears that neither Sorenson nor Neilsen had any pecuniary interest whatsoever in the claim (R. 252–255, 238–251); that they had been paid in full for their interest in the partnership profits, had executed releases to the executor, and had agreed to turn over any monies recovered on account of the claim to the executor (R. 252–255). Counsel for the plaintiffs in the original suit was apparently retained by Siel-

motion was heard before Judge Goddard, who concluded that no jurisdiction had existed to enter the 1929 judgment, which he accordingly set aside (R. 1103–1106).[5] On appeal, the Circuit Court of

cken's widow, sole distributee of his estate (R. 37, 38, 160–168, 307, 361–408, 515) with the authorization of the executor (R. 167, 168, 307); and it appears probable that counsel deliberately refrained from making the trust company, as executor, a party to the suit because he felt that this would make the court's lack of jurisdiction apparent (R. 20–21, 217–218). It was judicially determined, in 1933, that Sorenson and Nielsen did not have standing to sue to collect debts owing to Crossman & Sielcken (R. 238–251, 263). It further appears that the plaintiffs received nothing out of the amount awarded (R. 262, 273–4, 279); that approximately one-half was paid to Z. E. G., the German government corporation which in no circumstances was entitled to recover any part of its property seized by the Alien Property Custodian (R. 223–237, 924), and that this settlement was possibly the result of a pre-trial understanding between plaintiff's counsel and Z. E. G. (R. 34–35, 192–4); that $50,000 of the amount recovered was paid to a German firm, Theodor Wille (R. 39–40, 223–237, 924), which had had either a half interest in the seized cargoes or some other agreement to share profits and losses on the transaction (R. 11–12, 220, 868–870, 1030–31), and that the balance was retained by the respondent trust company, as executor, which had assented to this distribution (R. 228, 307, 924).

[5] Judge Goddard also found that the 1929 judgment had been obtained by fraud. He stated in part in his opinion (R. 1088–1089): "It is clear from the foregoing that the controversy involved in the suit in which the plaintiffs obtained the decree which the Government now seeks to vacate, although nominally between the plaintiffs, as alleged nonenemy surviving partners of the firm of Crossman & Sielcken, and the defendants was actually and substantially a controversy between an executor of an enemy jointly interested with an enemy firm and the defendants;

Appeals for the Second Circuit reversed on the ground that the 1929 judgment was conclusive and that the issue of jurisdiction was *res judicata* (R. 1118–1127).

### SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the 1929 judgment was *res judicata* on the question whether the estate of Sielcken was the beneficial owner of the claim sued on, and whether Sielcken was an "enemy" as defined in the Trading with the Enemy Act.

2. In holding that the 1929 judgment was *res judicata* on these questions even if they were not actually litigated in that proceeding.

3. In holding that these questions were actually litigated in the original proceeding.

4. In reversing the order of the District Court setting aside the 1929 judgment.

### SUMMARY OF ARGUMENT

1. A suit under Section 9 (a) of the Trading with the Enemy Act is a suit against the United States; the district court has jurisdiction over such a suit only to the extent to which the United States has consented to be sued. One of the con-

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furthermore, it appears that Sorenson and Nielsen were collusively made parties plaintiff for the purpose of 'creating a case cognizable' under the Trading with the Enemy Act."

The court below held that the finding of fraud was not ground for vacating the judgment because the proper procedure in the case of fraud was to move by bill of review rather than by motion to vacate. This holding of the court below is not now before this Court for review.

ditions upon which the consent of the United States has been given to suit against it under the Act is that the action be brought by one who is not an "enemy." This condition was plainly not met in the original action.

At the time that action was commenced, all the assets of the partnership of Crossman & Sielcken, including the claim sued on, had passed, pursuant to the partnership agreement, to the estate of Sielcken, and neither Sorenson nor Nielsen had any personal interest in the recovery. It is clear, therefore, that the action was brought on behalf of Sielcken's estate. The status of the estate was that of an enemy. Judge Goddard found, and the record permits no other conclusion, that at the time of his death Sielcken was an "enemy" within the meaning of the Trading with the Enemy Act. The status of Sielcken's estate is, of course, the same as that of Sielcken; Sielcken's legal representative can have no greater rights than Sielcken would have had himself if living. Since the status of Sielcken's estate was that of an enemy and since the estate not only owned the debt claim but was the sole party interested in the recovery, it is perfectly apparent that the suit against the Custodian on the claim was not one authorized by Section 9 (a).

It could not be contended that the court would have had jurisdiction if the suit had been brought by the executor of Sielcken's estate, as should have been done. The result is not changed because, in an

attempt to conceal the jurisdictional defect, the partnership was interposed as nominal plaintiff. Under the Act a partnership is not a separate legal entity distinct from its members. By the express provisions of Section 2, a suit by a partnership is a suit by a "body of individuals" and, if one of the members be an enemy, is a suit by an enemy to the extent of such member's interest. If the action had been brought during Sielcken's life it would therefore have been an enemy claim to the extent of his interest. It was equally an enemy claim after his death to the full extent of the interest of his estate in the partnership assets.

The requirement of nonenemy status prescribed by Section 9 (a) is expressly made a limitation on the right to sue. This requirement not having been satisfied, the suit was one against the United States which the United States had not authorized and over which, therefore, the District Court had no jurisdiction.

2. Since the original proceeding was an unauthorized suit against the United States and since, therefore, the District Court had no power to exercise jurisdiction in the case, the judgment which it entered was void and it was properly vacated on the present motion. *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506.

The opposite conclusion reached by the court below was based on the premise that the jurisdictional issue was adjudicated in the original action

and that therefore the judgment entered was beyond attack, even though the court which entered it was entirely without jurisdiction. This conclusion was thought to be required by the decision in *Stoll* v. *Gottlieb*, 305 U. S. 165. The court below further held that the 1929 judgment was beyond attack even if the jurisdictional issue was not adjudicated in the original action. This ruling was thought to be required by the decision in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371. Since the court below decided the present case, this Court has held that a judgment rendered against the United States without its consent is "void" and that such a judgment is not *res judicata* of the jurisdiction of the court in which it was rendered, at least where the jurisdictional issue was not adjudicated in the original suit. *United States* v. *U. S. Fidelity & Guaranty Co.*, *supra*. It is the Government's position that the present case falls directly within the rule of the *Fidelity & Guaranty Co.* case.

Examination of the record establishes beyond question, as Judge Goddard expressly found, that the jurisdictional issue of whether the suit was brought on behalf of an enemy was not contested or adjudicated in the original proceeding. This being so, the judgment entered in that proceeding could not be *res judicata* of the jurisdictional issue on the present motion to vacate. Although in some situations *res judicata* may be pleaded as a bar not

only with respect to jurisdictional matters actually contested but also with respect to jurisdictional matters which might have been contested (see *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 378), this rule is entirely inapplicable where the issue is the waiver of sovereign immunity. *United States* v. *U. S. Fidelity & Guaranty Co., supra.*

Moreover, even if it be held that the jurisdictional issue was adjudicated in the original proceeding, the judgment entered in that proceeding was properly vacated on the present motion. The doctrine of *res judicata* is not one of mechanical application and other and competing policies may sometimes be entitled to overriding consideration. Here the private interest in the finality of litigation must, we believe, yield to the public policy which forbids suits against the United States without its consent. This policy is peculiarly strong in the case of the Trading with the Enemy Act. Under that Act, as amended, seized property which was not returnable or subject to a debt claim under Section 9 (a) was held by the United States as a means of securing satisfaction of American claims from the German government. The public interest in strengthening the position of the United States in obtaining from a foreign power a just settlement of American claims is superior, we submit, to any private interest in the finality of litigation.

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Moreover, a motion to vacate is not a collateral attack but a method of direct review to which the doctrine of *res judicata* is not applicable. The decree rendered by Judge Goddard in the present case was simply an exercise by the District Court of its plenary power to vacate its own judgments at any time for want of jurisdiction.

## ARGUMENT

### I

### THE DISTRICT COURT WAS WITHOUT JURISDICTION TO RENDER THE CHALLENGED JUDGMENT

A suit under Section 9 (a) of the Trading with the Enemy Act is a suit against the United States; the district court has jurisdiction over such a suit only to the extent to which the United States has consented to be sued. One of the conditions upon which the consent of the United States has been given to suit against it under the Act is that the action be brought by one who is not an "enemy." In the view of the Government, this condition was plainly not met in the original proceeding and the suit, therefore, was one to which the United States had not consented. It follows both that the District Court had no power to enter the judgment which it rendered in 1929, and, as we demonstrate in Point II, that that judgment was properly vacated on the present motion.

A. THE ORIGINAL ACTION WAS NOT AUTHORIZED BY SECTION 9 (a) OF THE TRADING WITH THE ENEMY ACT

Section 9 (a) authorizes suits against the Alien Property Custodian only by a person who is "not an enemy or ally of enemy". Section 2 defines "enemy" to include any person who is "resident within the territory * * * of any nation with which the United States is at war, or resident outside the United States and doing business within such territory".

Under these sections, it is plain that the original action was an unauthorized suit against the United States because it was prosecuted solely on behalf and for the benefit of the estate of Sielcken[6] and Sielcken had the status of an enemy. At the time at which the debt to Crossman & Sielcken arose, the entire capital of the partnership belonged to Sielcken; the interest of Sorenson and Nielsen together was merely in 25 percent of the net profits of the business (R. 59–60, 806–807). The partnership dissolved in 1917, if not upon the declaration of war on April 6 (see *Sutherland* v. *Mayer*, 271 U. S.

[6] The record indicates that, in addition to Sielcken's estate, Z. E. G., the German government corporation, and the German firm of Theodore Wille also had an interest in the recovery. See footnote 4, pages 7–8, *supra*. Both Z. E. G. and Theodor Wille were, of course, enemies. However, since the Government is not urging in this Court as ground for reversal that Z. E. G. and Theodor Wille had an interest in the claim, the case will be discussed as though Sielcken's executor had made no agreement with them to share the proceeds of recovery.

272, 286), then upon Sielcken's death on October 8.[7] After Sielcken's death, all the capital, property, and business of the firm, including as an asset the debt here involved, belonged "entirely and absolutely" to his estate pursuant to the terms of the partnership agreement (R. 59–60).[8] Consequently, when the action was commenced against the Custodian in 1927 neither Sorenson, Nielsen, nor the firm of Crossman & Sielcken had any interest in the claim (R. 262–264); any amount recovered was solely for the benefit of Sielcken's estate.[9]

The status of Sielcken's estate was that of an enemy. Judge Goddard found, and the record permits no other conclusion, that Sielcken resided in Germany from 1914 until his death in October

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[7] The partnership agreement expressly provided that the "partnership shall continue until terminated by the death of one of the partners" (R. 60).

[8] The agreement of copartnership provided, *inter alia*, that upon the termination of the partnership from whatever cause, the whole of the capital should belong absolutely to Sielcken or his estate and the other partners were to have no share or title to any of it (R. 59–60). The agreement also provided that upon the death of Sielcken, the surviving partners should transfer and pay over to his executor all of Sielcken's capital and all the property and business of the firm (R. 62).

[9] Aside from the fact that ownership of the claim had passed to Sielcken or his estate under the partnership agreement, both Sorenson and Nielsen had executed releases in which, among other things, they agreed that they would turn over to the executor of Sielcken's estate any amounts they might receive on account of the claim here in issue (R. 252–255, 238–245).

1917, and that he was, therefore, an "enemy" within the definition of Section 2 of the Act. The record further shows that he regarded Germany as his domicile,[10] that he sought German naturalization in 1914 (R. 371, 909–910),[11] and that his loyalty was to Germany rather than to the United States (R. 1037, 910–916, 930). The status of the estate is, of course, the same as that of Sielcken; Sielcken's legal representative can have no greater rights than Sielcken would have had himself, if living. See Section 9 (d) of the Act; *Miller* v. *Schutte*, 287 Fed. 604, 607–608 (App. D. C.).

Since the status of Sielcken's estate was that of an enemy and since the estate not only owned the debt claim but was the sole party interested in the recovery, it is perfectly apparent that the suit against the Custodian on the claim was not one authorized by Section 9 (a). Certainly none would contend that the court would have had jurisdiction if the suit had been brought by the executor of Sielcken's estate, as should have been done (see pp. 23–24, *infra*). The result is not changed be-

[10] Sielcken's American will (R. 64–70) describes Sielcken as "of Baden-Baden, Germany," calls Germany his "domicile," makes bequests solely to German persons and institutions, provides for the liquidation of his American estate and its transmission to Germany, and evidently regards his home in Baden-Baden as his real home.

[11] Sielcken apparently failed to complete his expatriation solely because of a belief on the part of the German authorities that he would be more useful as an American citizen (R. 910).

cause, in an attempt to conceal the jurisdictional defect, the partnership was interposed as nominal plaintiff.

The suit was brought in the name of Sorenson and Nielsen "as the surviving partners of the firm of Crossman & Sielcken" (R. 1, 38), and the complaint alleged in paragraph second that the partnership was a resident of the State of New York and that it was at no time an enemy or ally of enemy within the meaning of the Act (R. 319). Respondent contends that these allegations were true and that they were sufficient to satisfy the nonenemy requirements of Section 9 (a). The contention is, in effect, that, even though at the time of suit all the assets of the partnership, including the debt here involved, belonged to Sielcken's estate and the estate was the sole party interested in the recovery, the partnership is nevertheless to be considered as the claimant and its status as an enemy or nonenemy is to be determined entirely without regard to the status of the estate. The Act, of course, permits of no such obvious evasion of its nonenemy requirement.

The principal fallacy underlying respondent's position is its fundamental assumption that, for purposes of the Act, a partnership may be treated as a separate entity, enjoying a status separate and distinct from the status of its members. The short answer is that, under the Act, a partnership is merely a body of individuals. A claim by a part-

nership, therefore, is a claim by its individual members and, if one of the members be an enemy, is a claim by an enemy, at least to the extent of that member's partnership interest. Cf. *Froelich & Kuttner* v. *Sutherland*, 22 F. (2d) 870 (App. D. C.); *Rossmoore* v. *Commissioner*, 76 F. (2d) 520, 521 (C. C. A. 2d); Mechem, *Elements of the Law of Partnership* (2d ed.), Secs. 6–8. Any other rule would be nugatory of the policy of the Act, since it would allow recovery by a partnership doing business in the United States even though all the partners, to whom the benefit of recovery would inure, had the status of enemies.

This conclusion is fortified by the definition of "enemy" contained in Section 2. This section provides that the word "enemy" shall be deemed to mean—

> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.

It is to be noted that under the provisions of this section, a partnership is grouped with an "indi-

vidual" and "*other* body of individuals."[12] Under the express terms of the Act, therefore, a claim filed by a "partnership" is a claim of a "body of individuals." The statutory definition sharply distinguishes between such a "body of individuals" and a "corporation." Corporate enemies were separately defined for the avowed purpose of treating corporations as separate legal entities, the Congress having concluded that a disregard of the corporate entity would involve grave administrative difficulties. *Behn, Meyer & Co.* v. *Miller,* 266 U. S. 457, 462. It cannot seriously be suggested that Congress intended comparably to endow any "body of individuals" with a legal personality separate and distinct from that of its members. None of the administrative difficulties which prompted the separate treatment of corporations justify or require a like distinction between an association and its members. In the actual administration of the Act, the Alien Property Custodian always treated partnership assets as the property of the individual members for all purposes, including seizure, and this practice was consistently sustained in the courts. *Froelich & Kuttner* v. *Sutherland,* 22 F. (2d) 870 (App. D. C.); cf. *Waldes* v. *Basch,* 109 N. Y. Misc. 306, affirmed without opinion, 191 N. Y. App. Div. 904; *Rossie* v. *Garvan,* 274 Fed.

[12] Similarly, Section 2 defines the word "person" as meaning "an individual, partnership, association, company, or other unincorporated body of individuals, or corporation or body politic."

447 (D. Conn.); *Schutte* v. *Miller*, 4 F. (2d) 288 (App. D. C.); *Mayer* v. *Garvan*, 278 Fed. 27 (C. C. A. 1st).

Indeed, under the express terms of Section 2, which makes "residence" a test of status, the Act could not have been administered on any other basis. A "partnership" or "other body of individuals" can be considered "resident" only where it does business or where its members reside. As used in Section 2, "residence" clearly does not mean the place of doing business since the section clearly differentiates between "residence" and "doing business"; for purposes of this section, therefore, the residence of the partnership must be the residence of the partners. This construction of the statute accords with the law of New York, which is to the effect that a partnership has no residence distinct from the residences of the partners. *Bulkley* v. *O'Donnell*, 148 Misc. 186, 265 N. Y. Supp. 495.

It is clear, therefore, that to the extent of the interest of Sielcken, the claim of the partnership was the claim of an enemy. And since the claim was originally one of an enemy, it remained so after Sielcken's interest passed to his estate. It is, of course, immaterial that at the time of the institution of the suit, Sorenson and Nielsen were the sole surviving partners and that they were non-enemies. A claim by a partnership is a claim by its members and upon the death of any member is

a claim by the decedent's estate to the extent of its interest under the partnership agreement. Whether or not Sielcken's estate was technically a "member" of the partnership in liquidation, it owned all the partnership assets "entirely and absolutely" and the authority of the surviving partners, if any, was limited to the power to collect the claim on behalf of the estate.

The conclusion is the same even though it be assumed that a partnership is a separate legal entity under the Act. As we have pointed out, the partnership was dissolved in 1917 and the right to sue was, therefore, dependent on the status of the individual members or their estates. This is shown, for example, by the fact that, after dissolution, a nonenemy partner of an enemy partnership had a right to recover from the Custodian his share of the seized partnership assets. *Mayer* v. *Garvan,* 278 Fed. 27 (C. C. A. 1st); see *Sutherland* v. *Mayer,* 271 U. S. 272, 285. The claim was not that of a nonenemy simply because those purporting to act as liquidating agents for the partnership, after dissolution, were nonenemies. The controlling factor after dissolution was the status of the individuals or their estates for whom, and not the status of those by whom, the partnership was being liquidated. Like Sielcken's executor, the surviving partners were merely trustees for the estate (*Joseph* v. *Herzig,* 198 N. Y. 456, 462; *Losch* v. *Marcin,* 251 N. Y. 402, 410; *Bauchle* v. *Smylie,* 104

N. Y. App. Div. 513, 515); their right to sue under the Trading with the Enemy Act, therefore, like that of the executor, necessarily depended upon Sielcken's status.

Indeed, it seems plain that Sorenson and Nielsen, as surviving partners of the firm, were not even proper parties plaintiff in the suit against the Custodian, and that, as the District Court found (R. 1089), they were collusively made parties plaintiff for the sole purpose of making it appear that the court had jurisdiction of the case.[13] After the dissolution of the partnership in 1917 all of the assets of the firm, including the debt here involved, belonged to Sielcken's estate. The suit against the Custodian should, therefore, have been brought by the American executor of the estate. That estate clearly had the status of an enemy. Certainly jurisdiction of a suit, not authorized by Congress, cannot be conferred on the court by

[13] Section 9 (a) requires that notice of the claim be filed with the Alien Property Custodian "under oath and in such form and containing such particulars as the said custodian shall require". Pursuant to this direction, the Custodian required each claimant under Section 9 (a) to state, under oath, that he was entitled to the payment sought under the Act, that no other person had any interest in or lien upon the proceeds of the claim set forth in the notice, and that the notice was not filed in collusion with any enemy or ally of enemy, or any other person or persons for the purpose of avoiding the terms and provisions of the Act. Sorenson and Nielsen filed such a statement before commencing suit (R. 147–154, 152), and so alleged in their bill of complaint (R. 322).

bringing the suit improperly in the name of non-enemies having no interest in the claim sued on."[14]

B. SINCE THE ORIGINAL ACTION WAS NOT AUTHORIZED BY SECTION 9 (a), IT WAS A SUIT AGAINST THE UNITED STATES OVER WHICH THE DISTRICT COURT HAD NO JURISDICTION

As we have stated above, a suit against the Alien Property Custodian is a suit against the United States. *Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 602–603; *Becker Steel Co.* v. *Cummings,* 296 U. S. 74, 78; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118. Consequently, the district court has jurisdiction only if and to the extent that the suit is authorized by the Trading with the Enemy Act. "Consent alone," this Court has held, "gives

[14] The attempted justification for the procedure followed is Sections 61 and 68 of the New York Partnership Law. Section 61 provides that a partnership is not terminated on dissolution but continues until the winding up of partnership affairs is completed; Section 68 provides that "unless otherwise agreed," the surviving partners have the right to wind up the partnership affairs. The fallacy underlying respondent's reliance upon these provisions is that maintenance of the suit against the Custodian was in no way connected with winding up the partnership affairs. Under the partnership agreement, all assets of the firm, including the claim against the Custodian, belonged to Sielcken or his estate upon dissolution of the partnership; after the dissolution in 1917, collection of the claim was the concern of Sielcken or his executor and was not the concern of the partnership. Indeed, in a suit in the New York courts, to which the Government was not a party, it was definitely determined in 1933 that Sielcken's American executor had the sole right to liquidate the partnership and that neither Sorenson nor Nielsen had been a liquidating partner (R. 35–37, 238–251, 263–264).

jurisdiction to adjudge against a sovereign." *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506, 514. And the conditions of such consent, whether in regard to parties (*Austin* v. *United States*, 155 U. S. 417, 433; *Johnson* v. *United States*, 160 U. S. 546, 549), the subject matter of the action (*Bonner* v. *United States*, 9 Wall. 156; *Hill* v. *United States*, 149 U. S. 593; *Bigby* v. *United States*, 188 U. S. 400), the character or amount of relief (*United States* v. *Jones*, 131 U. S. 1; *Nortz* v. *United States*, 294 U. S. 317, 327; *Franklin* v. *United States*, 308 U. S. 516; *United States* v. *Tacoma Oriental S. S. Co.*, 86 F. (2d) 363, 369 (C. C. A. 9th)), or the time within which the action must be instituted (*Finn* v. *United States*, 123 U. S. 277, 232–233; *United States* v. *Wardwell*, 172 U. S. 48, 52; *United States* v. *Seminole Nation*, 299 U. S. 417, 421–422; *Davis* v. *L. S. Cohen & Co.*, 268 U. S. 638, 642; *Munro* v. *United States*, 303 U. S. 36, 40–41; *Compagnie Generale Transatlantique* v. *United States*, 51 F. (2d) 1053, 1056 (C. C. A. 2d)),[15] are jurisdictional limitations no less than the requirement of consent itself.

Under the same principle, the requirement of nonenemy status, prescribed by Section 9 (a), which is expressly made a limitation on the right to sue, is jurisdictional in nature. Judge Goddard so

[15] The question whether the defense of the statute of limitations in a suit brought under the Trading with the Enemy Act is jurisdictional was left open in *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 82.

held, the court below so assumed, and such has been the uniform ruling in other courts. *Garvin* v. *Kogler*, 272 Fed. 442 (C. C. A. 3d); *Thorsch* v. *Miller*, 5 F. (2d) 118 (App. D. C.), appeal dismissed, 274 U. S. 763; *Cummings* v. *Isenberg*, 89 F. (2d) 489 (App. D. C.), certiorari denied, 301 U. S. 682. Indeed, the doctrine that conditions upon the consent of the United States are of the same jurisdictional character as the requirement of consent itself, is peculiarly applicable here, where the condition concerns the personal qualifications of the claimant in his relationship to the Government; such a condition goes not to the technical requirements of procedure but to the willingness of the Government to permit any recovery at all.[16] This condition not having been met, the suit was plainly one against the United States which the United States had not authorized and over which, therefore, the District Court had no jurisdiction.

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[16] Such conditions have always been recognized as jurisdictional. Thus loyalty during the Civil War was made a prerequisite to the maintenance of an action with respect to certain Civil War claims and declared to be a jurisdictional fact. Judicial Code, Sec. 184, U. S. C., Title 28, Section 290. And this Court held that the requirement of loyalty in a special Act dealing with Civil War claims was jurisdictional even in the absence of an express provision to that effect. *Austin* v. *United States*, 155 U. S. 417, 433. Similarly, under the Act of March 3, 1891 (c. 538, 26 Stat. 851), vesting jurisdiction in the Court of Claims to determine "All claims for property of citizens of the United States taken or destroyed by Indians", this Court held that citizenship was a condition of jurisdiction. *Johnson* v. *United States*, 160 U. S. 546; *Contzen* v. *United States*, 179 U. S. 191.

## II

### The Judgment Entered in the Original Action Was Properly Vacated on the Present Motion

Since the original proceeding was an unauthorized suit against the United States and since, therefore, the District Court had no power to exercise jurisdiction in the case, it seems clear that the judgment which it entered was void and that it was properly vacated on the present motion. *United States* v. *U. S. Fidelity & Guaranty Co.*, 309 U. S. 506.

The opposite conclusion reached by the court below was based on the premise that the jurisdictional issue was adjudicated in the original action and that therefore the judgment entered was beyond attack, even though the court which entered it was entirely without jurisdiction. This conclusion was thought to be required by the decision in *Stoll* v. *Gottlieb*, 305 U. S. 165. The court below further held that the 1929 judgment was beyond attack even if the jurisdictional issue was not adjudicated in the original action. This ruling was thought to be required by the decision in *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371.

Since the court below decided the present case, this Court has held that a judgment rendered against the United States without its consent is "void" and that such a judgment is not *res judicata* of the jurisdiction of the court in which it was

rendered, at least where the jurisdictional issue was not adjudicated in the original suit. *United States* v. *U. S. Fidelity & Guaranty Co., supra.* It is the Government's position in the present case that the jurisdictional question was not adjudicated in the 1929 proceeding and that the case is therefore directly within the principle of the *Fidelity & Guaranty Co.* decision. The Government further contends that even if the issue had been adjudicated by Judge Caffey, the 1929 judgment would still not be a bar to reconsideration of the question on the present motion to vacate.

### A. THE JURISDICTIONAL ISSUE WAS NOT ADJUDICATED IN THE ORIGINAL PROCEEDING

The pleadings in the original proceeding appear at R. 318–350; the stenographer's minutes of the 1929 trial appear at R. 788–866. Examination of these portions of the record establishes beyond question, as Judge Goddard expressly found (R. 1089–1090), that the jurisdictional question of whether the suit was brought on behalf of an enemy was not contested or adjudicated in the original proceeding.

At the trial the defendants claimed that Sielcken was a resident of Germany at the time of the war, that he owned all the capital of the partnership, and that upon his death it was the duty of the surviving partners to pay over to his executor the capital, property, and business of the firm (R. 807). But it was never even remotely suggested that these

facts raised a jurisdictional issue. Sielcken's residence and interest in the partnership were relied upon solely to show that Z. E. G. was not indebted to the partnership. The argument of both Z. E. G. and of the Government was that, despite Sielcken's American citizenship, his German residence made him an enemy within the common-law doctrine that a partnership between citizens and an enemy is dissolved at the outbreak of war (see *Sutherland* v. *Mayer,* 271 U. S. 272, 286); that, therefore, after the outbreak of war, the partnership was dissolved, the debt belonged to Sielcken and his executors were consequently empowered to collect the debt from Z. E. G. and to submit the claim to arbitration. In support of this contention it was argued that because Sielcken was an "enemy" as defined in the Trading with the Enemy Act by reason of his residence in Germany, he was by analogy an enemy within the common-law dissolution doctrine. Every reference by counsel to Sielcken's enemy status was made in this connection; Section 2 of the Trading with the Enemy Act was used only to provide a persuasive analogy (R. 797, 809, 814, 852–857).

Judge Caffey rejected this argument. He held that, while Sielcken may have been an "enemy" as defined in the Act, he did not become an enemy within the meaning of the dissolution doctrine, at least so far as transactions occurring prior to the war were concerned. The distinction in the

court's view between the Act and the common-law doctrine was clearly indicated and the court expressly concluded that the provisions of the Act defining "enemy" were in no way involve .[17]

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[17] The main discussion of the question at the trial appears at R. 851–857. Judge Caffey, in the course of a colloquy with counsel, said (R. 852–853):

"The proposition there is whether or not where there is an existing agreement between nationals of two countries who later go to war, as a result of the war that there is a dissolution of the partnership agreement.

"In this case the partnership agreement was between American citizens; and it is inconceivable to me that there should be a precedent in a foreign country of an American citizen at the time that his own country, the United States, goes to war with that country which results *ipso facto* in a dissolution of his partnership.

"I do not believe that it even results in a suspension during the period of the war, in a suspension of the partnership. It is very certain in my mind that it cannot affect the rights of the parties into ceasing with respect to a transaction which occurred long prior to the war.

"I do not find anything in the authorities to indicate that war has any such harsh consequences, and it does not follow from the fact that for purposes of administering our own affairs in the way that we see fit, that we provided in such a statute as that, the Trading with the Enemy Act, for the regulation of affairs during the period of the war, and for the purpose of such regulation that we shall in the respects specified in that statute in the administration of the matters dealt with by that statute, treat an American citizen who is in an enemy country, for the purpose of the statute, as an alien enemy.

"It does not follow at all from that that he is an alien enemy in the sense that a national of the country with which we are at war is an alien enemy."

And again at R. 855–856:

"The COURT. That is entirely true, so far as any current transactions or communications between them are concerned,

The jurisdictional question was not adverted to in the opinion or the judgment. The court's determination that the defendant Z. E. G. "is indebted to the plaintiffs" (R. 351), pointed to by respondent, was obviously only a determination that Z. E. G. was indebted to the partnership.

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but insofar as concerns transactions occurring long prior to the war—and that is what we are concerned with here—I am going to hold that it certainly follows that the German executives [*sic*] of Sielcken had no authority to deal with that prior transaction so as to determine, as between the German Government or of this organization acting for the German account that you referred to, to be adjudicated or passed upon in any such proceeding.

"Mr. RHODES. As I understand your Honor, you do not rule that the partnership was not dissolved.

"The COURT. It may have been suspended for the purposes of the Trading with the Enemy Act. You may call it dissolved. I do not care what you call it.

"I am trying to draw distinction between the necessary consequence of the war *and the provisions of the Trading with the Enemy Act, because we are not concerned with the provisions of the Trading with the Enemy Act here in that regard.* [Italics supplied.]

"Mr. RHODES. I gleaned the impression that you thought there was a distinction between an American citizen residing in Germany and a German citizen.

"The COURT. There is a vital distinction. It is a governing distinction."

In his memorandum opinion, Judge Caffey disposed of the alleged dissolution of the partnership as follows (R. 865):

"I have already indicated to you my view, that under the partnership agreement, the executors of Sielcken in Germany, had not the slightest authority or right to settle or otherwise dispose of a partnership asset which had come into existence long prior to our entering the War, out of these transactions which occurred in 1914."

The court below disagreed with and therefore disregarded Judge Goddard's finding that the jurisdictional issue had not been decided by Judge Caffey in the original proceeding; it reached the opposite conclusion based solely on its interpretation of the first two paragraphs of the bill of complaint. In relying exclusively upon the allegations of the bill, the court below, we believe, committed fundamental error since, in the circumstances of this case, the pleadings are not material. The pleadings may disclose the issues which could have been or were necessarily decided. This Court has held, however, that a judgment is not *res judicata* of the issue of consent to sue unless, at least, there has been an actual adjudication of the question, even though the issue is necessarily involved. *United States* v. *U. S. Fidelity & Guaranty Co., supra.* The pleadings may sometimes constitute evidence that an issue was actually determined, but in this case it affirmatively appears that Judge Caffey did not consider or decide the jurisdictional issue. And where the plea of *res judicata* depends for its validity upon an actual determination, as where the judgment in another cause of action between the same parties is involved, "it is not enough that a matter was in issue, but it must clearly appear to have been adjudicated." 2 Freeman, *Judgments* (5th ed.), § 689, p. 1455; *Cromwell* v. *County of Sac,* 94 U. S. 351; *Russell* v. *Place,* 94 U. S. 606, 610; *Moran Towing & Transp. Co., Inc.* v. *Navigazione*

*Libera Triestina, S. A.*, 92 F. (2d) 37 (C. C. A. 2d), certiorari denied, 302 U. S. 744; *Woodbury* v. *District of Columbia*, 92 F. (2d) 202 (App. D. C.); *Marine Transit Corp.* v. *Switzerland General Ins. Co. of Zurich*, 263 N. Y. 139, 147.[18]

In any event, the pleadings do not disclose any intention to raise the jurisdictional issue. The first paragraph of the bill alleged that Sorenson, Nielsen and Sielcken were all citizens and residents of the United States; the second paragraph alleged that the partnership of Crossman & Sielcken was a resident of New York and that it was neither an enemy nor ally of enemy within the meaning of the Trading with the Enemy Act (R. 319). Z. E. G.'s answer admitted the existence of the partnership prior to the outbreak of war between the United States and Germany, but otherwise denied each and every allegation in the first paragraph. As to the allegation in the second paragraph, Z. E. G. denied knowledge or information sufficient to form a belief (R. 324–325). The Government denied knowledge as to all the allegations of both paragraphs (R. 338).

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[18] The opinion of the court and the entire record of the original proceedings may be examined to determine whether the question was actually determined. *Oklahoma* v. *Texas*, 256 U. S. 70, 88; *Moran Towing & Transp. Co., Inc.* v. *Navigazione Libera Triestina, S. A.*, 92 F. (2d) 37 (C. C. A. 2d), certiorari denied, 302 U. S. 744; *Marine Transit Corp.* v. *Switzerland General Ins. Co. of Zurich*, 263 N. Y. 139, 145, 147; *Matter of Lee*, 220 N. Y. 532, 537–538; cf. *Russell* v. *Place*, 94 U. S. 606, 608.

Z. E. G.'s denial of the allegation that Sielcken resided in the United States was plainly designed simply to support its contention that it was not indebted to the partnership. In its affirmative defenses, Z. E. G. elaborated this contention in detail and, in support of the authority of Sielcken's German executors to make a binding arbitration agreement [sixth and seventh defenses (R. 329–331)], alleged that Sielcken became an enemy by virtue of his residence in Germany and that the partnership was therefore dissolved upon the declaration of war. It was in this connection that the allegations of enemy status quoted by respondent (Br. in Opp., pp. 6–7) were made.

That neither Z. E. G. nor the Government intended to raise any jurisdictional issue is shown by their answers to the sixth paragraph of the bill, to which the court below did not refer. This paragraph alleged that the court had jurisdiction of the suit under Section 9 of the Trading with the Enemy Act (R. 320). Z. E. G. failed to answer this paragraph; the Government averred that the allegations of the paragraph constituted "statements of law" to which no counter-pleading was required (R. 339). Certainly had Z. E. G. or the Government sought to raise the jurisdictional issue of whether the nonenemy requirement of Section 9 (a) was met, some indication thereof would have been given in the answers, either in response to the sixth paragraph of the complaint or otherwise.

In the absence of such an indication, it is a fair assumption that neither defendant intended to raise that issue.

B. SINCE THE JURISDICTIONAL ISSUE WAS NOT ADJUDICATED IN THE ORIGINAL PROCEEDING, THE JUDGMENT ENTERED IN THAT PROCEEDING IS NOT RES JUDICATA OF THE JURISDICTION OF THE COURT TO ENTER THE JUDGMENT

In *Stoll* v. *Gottlieb,* 305 U. S. 165, relied upon by the court below, this Court applied the general rule that, where the question of jurisdiction has been decided as an actually contested issue in one proceeding, the decision is *res judicata* of the jurisdictional issue in a subsequent proceeding. That decision is, of course, inapplicable to the present case since, as we have shown, the jurisdictional question was neither contested before nor decided by Judge Caffey.

In *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, also relied upon by the court below, the rule of *Stoll* v. *Gottlieb* was extended to cover a situation where the jurisdictional issue was not raised in the earlier proceeding. In that case, a state drainage district had readjusted its indebtedness under the Act of May 24, 1934, providing for "Municipal-Debt Readjustments" (48 Stat. 798), and had secured from a United States district court a decree cancelling its old bonds and enjoining the bondholders from asserting any claim thereon. Subsequently this Court declared the

statute under which the decree was entered to be unconstitutional. *Ashton* v. *Cameron County District,* 298 U. S. 513. Certain bondholders then brought suit in the district court to recover on their bonds. The drainage district pleaded the decree cancelling the bonds as *res judicata,* and this Court held the plea to be good. Pointing to the inequities which would be caused by the adoption of a principle of absolute retroactive invalidity, the Court expressed the view that a decree entered under a statute later declared to be unconstitutional must be considered immune from collateral attack, even though the validity of the statute was not put in issue in the proceeding in which the decree was entered.

Although the Court stated generally in its opinion (308 U. S. at 378) that *res judicata* may be pleaded as a bar not only with respect to jurisdictional matters actually contested but also with respect to jurisdictional matters which might have been contested, the decision did not establish an inflexible rule of *res judicata* to be generally applied, but merely held controlling, in the particular situation presented, the policy favoring finality of judgments. That in other situations this policy may be overridden by a countervailing policy is shown by *Kalb* v. *Feuerstein,* 308 U. S. 433, decided the same day as the *Chicot County* case, and by *United States* v. *U. S. Fidelity & Guaranty Co.,* 309 U. S. 506.

In the *Kalb* case, a judgment of foreclosure against a farm debtor, entered by a state court, was held to be void and subject to collateral attack where the state court had acted without the consent of the federal district court in which a petition of the debtor under Section 75 of the Bankruptcy Act was pending. This Court declared that Congress had set up in the Bankruptcy Act an exclusive method for rehabilitating distressed farmers and that consequently any action taken by a state court beyond its jurisdiction and in derogation of the policy of the Act was an absolute nullity, irrespective of whether the question of the jurisdiction of the state court was actually, or could have been, litigated in the state court proceedings. In other words, the Court there decided that the policy in favor of the finality of judgments was, under the circumstances presented, overridden by the countervailing policy embodied in Section 75 of the Bankruptcy Act.

The same approach was taken in *United States* v. *U. S. Fidelity & Guaranty Co., supra,* a decision which, in our view, controls the present case. There the United States, as trustee for certain Indian Nations, had filed a claim for royalties in a reorganization proceeding in the federal courts against the debtor company and the surety on its lease. The debtor filed a cross-claim which was allowed by the court, and a balance in favor of the debtor was decreed. The United States raised no

objection to the District Court's jurisdiction over the cross-claim and did not appeal from the judgment. Later the United States brought suit against the surety in another federal court for the same royalties. The debtor's trustee intervened, asking a decree that the original judgment was valid and not subject to collateral attack, and that he was entitled to judgment against the Indian Nations in the amount of the balance which had been found to be due the debtor. This Court held that the district court had been without jurisdiction to enter an affirmative judgment against the United States in the original proceeding, that to the extent that the judgment granted such relief it was a nullity, and that, consequently, it was not *res judicata* in the subsequent suit. While recognizing the strength of the policy in favor of the finality of judgments, which had controlled decision in the *Chicot County* case, the Court was of opinion that this policy "must * * * yield to the principle of immunity" (309 U. S. at 513). After specifically stating that the *Chicot County* case "is inapplicable where the issue is the waiver of immunity," the Court continued (p. 514–515):

> In the *Chicot County* case no inflexible rule as to collateral objection in general to judgments was declared. We explicitly limited our examination to the effect of a subsequent invalidation of the applicable jurisdictional statute upon an existing judgment in bankruptcy. To this extent the case definitely

> extended the area of adjudications that may not be the subject of collateral attack. No examination was made of the susceptibility to such objection of numerous groups of judgments concerning status, extra-territorial action of courts, or strictly jurisdictional and quasi-jurisdictional facts. No solution was attempted of the legal results of a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit. We are of the opinion, however, that without legislative action the doctrine of immunity should prevail.

It is unnecessary for present purposes to determine precisely where the line is to be drawn between the *Chicot County* case, on the one hand, and the *Kalb* and *Fidelity & Guaranty Co.* cases, on the other; it suffices for decision here that the doctrine of sovereign immunity overrides the policy favoring the finality of judgments. As we have shown, an action brought under the Trading with the Enemy Act by one who is in the position of an enemy is an unauthorized suit against the United States, to which the sovereign immunity of the United States is an absolute bar. Under the direct holding of the *Fidelity & Guaranty Co.* case, therefore, any judgment against the United States rendered in such a suit is a nullity and subject to collateral attack, at least where, as here, the jurisdictional issue was not mooted in the original proceeding.

The case is the same whether the Congress has withheld all consent or, as is usually the situation, has waived its immunity with respect to a limited class of parties or subject matter. If the suit falls outside the scope of the statutory grant, the want of consent is absolute and any judgment which is rendered may be questioned collaterally. It is the lack of consent which makes the judgment void, and not the type of question involved in determining whether or not consent was given or the type of proof necessary to establish the lack of consent.[19]

Respondent seeks to avoid the controlling force of the *Fidelity & Guaranty Co.* decision by urging that there the suit was "of a class" over which the court had no jurisdiction while here, and in the *Chicot County* case, the court had jurisdiction over the "class of case" but no jurisdiction over the particular suit (Br. in Opp., pp. 13–14). The attempted distinction is purely verbal; respondent has not defined the term "class of case" and without such a definition the distinction has no sub-

[19] The jurisdiction of the court depended upon determination of Sielcken's residence, and the court necessarily had jurisdiction to make that determination. Every court, in every case, has jurisdiction to determine its own jurisdiction. But jurisdiction to determine jurisdiction is far different from jurisdiction to enter judgment against the United States in a suit where jurisdiction is plainly absent, even though its absence is not pointed out by government counsel and the jurisdictional issue is not contested. Certainly, when the power to decide the jurisdictional issue is not exercised, the existence of that power cannot add validity to a judgment otherwise void. Cf. *Vallely* v. *Northern Fire Ins. Co.*, 254 U. S. 348, 355.

stance. Certainly in normal speech suits by enemies under the Trading with the Enemy Act would as readily be denominated a "class of case" as counterclaims against the United States (*United States* v. *U. S. Fidelity & Guaranty Co., supra*) or as the peculiar type of suit involved in *United States* v. *Ickes,* 84 F. (2d) 257 (App. D. C.), which respondent puts on the other side of the "class" line from the present case.

It may be that in making the "class of case" argument, respondent intends to draw a distinction between jurisdiction over subject matter and jurisdiction over parties and to contend that only where the court has no jurisdiction over the subject matter of the suit is its judgment a nullity and subject to collateral attack. If this be the meaning of the contention, it not only fails to explain cases such as the *Chicot County* case and *United States* v. *Ickes,* but it draws a wholly artificial line of demarcation. For example, in both the present case and in the *Fidelity & Guaranty Co.* case, which respondent would put on opposite sides of the line, there is the same basic jurisdictional defect of lack of consent by the United States to be sued: Consent is lacking in the present case because the United States has not authorized suits by persons who are enemies; it is lacking in the *Fidelity & Guaranty Co.* case because the United States has not authorized suits against it to be prosecuted by means of counter-claim. But in both cases it is the fact of, and not the reason for, the sovereign's

lack of consent which is fatal to the jurisdiction of the court. The "class of case" to which each action belongs is wholly irrelevant.

We believe it plain, therefore, that the present case falls directly within the *Fidelity & Guaranty Co.* case, that in the absence of a determination of the jurisdictional issue in the earlier proceeding the judgment rendered in that proceeding is not *res judicata* of the jurisdictional issue, and that since the judgment was clearly one against the United States which Congress had not authorized the District Court to enter, it was an absolute nullity and was properly vacated on the present motion.

C. EVEN IF IT BE HELD THAT THE JURISDICTIONAL ISSUE WAS ADJUDICATED IN THE ORIGINAL PROCEEDING, THE JUDGMENT ENTERED IN THAT PROCEEDING WAS PROPERLY VACATED

1. We have pointed out above that, as a general rule, where a jurisdictional question has been decided as an actually contested issue in one proceeding, the decision is *res judicata* of the jurisdictional issue in a subsequent proceeding. *Stoll* v. *Gottlieb*, 305 U. S. 165. But this rule is not one of mechanical application and other and competing policies may sometimes be entitled to overriding consideration. Thus in *Kalb* v. *Feuerstein, supra,* the action of a state court in ordering foreclosure after the filing of a petition under Section 75 of the Bankruptcy Act was held to be void and subject to collateral attack, irrespective of whether the issue of

jurisdiction was actually contested, or could have been contested, in the state court proceeding. Even if contested, this Court held, the policy of *res judicata* must yield to the policy embodied by Congress in the statute. That the policy forbidding suits against the United States without its consent is as strong as the policy making the jurisdiction of the federal courts exclusive in proceedings for the rehabilitation of distressed farmers cannot admit of doubt. See *United States* v. *U. S. Fidelity & Guaranty Co., supra,* at 514.

Moreover, even if under some circumstances an adjudication of the issue of waiver of immunity may be deemed to be *res judicata* of that issue, there are special considerations in this case which override the desirability of finality. Had the judgment for the plaintiffs been obtained prior to the termination of the war, the national interest in withholding funds from an enemy or a person aiding an enemy would certainly be recognized as superior to any private interest in the finality of litigation. The national interest, we submit, requires the same result even after the restoration of peace.

Congress provided in Section 12 of the original Trading with the Enemy Act (40 Stat. 411, 424) that "After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: * * *." Section 5 of the Joint Reso-

lution of July 2, 1921 (42 Stat. 105), which terminated the war, provided that the property of German nationals held by the United States "shall be retained by the United States of America and no disposition thereof be made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * or successors, shall have * * * made suitable provision for the satisfaction of all claims against said Governments." Thereafter, the Congress adopted a number of amendments to the Trading with the Enemy Act, in particular, the Winslow Act of March 4, 1923 (42 Stat. 1511), which permitted an enemy to recover up to $10,000 of the principal of his seized property and $10,000 annually of income from the property, and the Settlement of War Claims Act of 1928 (45 Stat. 254), which permitted the return of eighty per cent of the property seized to nationals of the former enemy countries and one hundred percent to American nationals. The limitations on the amounts returned were adopted for the purpose of providing a fund for the payment of claims of American nationals against the German government, in the event that Germany failed to make suitable provision for the settlement of American claims. S. Rep. No. 273, 70th Cong., 1st Sess., p. 13. The German government entered into an agreement on June 23, 1930, by which it undertook to pay in installments a sum

equal to the estimated claims of American nationals but shortly thereafter failed to make the agreed payments. Accordingly, the Congress enacted (48 Stat. 1268) that all payments under the Trading with the Enemy Act or Settlement of War Claims Act should be suspended except to the extent permitted by the President. It should be noted that Congress never modified or relaxed the provision of Section 9 (a) of the Trading with the Enemy Act limiting debt claims to those of nonenemies.

It thus appears that the seized property which was not returnable or subject to a debt claim under Section 9 (a) was held by the United States as a means of securing satisfaction of American claims from the German government. Cf. *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118–119. Public interest in strengthening the position of the United States in obtaining from a foreign power a just settlement of American claims is superior, we submit, to any private interest in the finality of litigation. *Cf. Burnet* v. *Brooks,* 288 U. S. 378, 396.

2. Finally it should be observed that a motion to vacate is not a collateral attack but a method of direct review to which the doctrine of *res judicata* is inapplicable.

That a motion to vacate a judgment is a direct and not a collateral attack has been recognized both by the courts and commentators. *Johnson* v. *Man-*

*hattan Railway Co.*, 289 U. S. 479, 495–496; *Cohen* v. *Portland Lodge, etc.*, 152 Fed. 357 (C. C. A. 9th); 1 Freeman, *Judgments* (5th ed.) § 2; 1 Black, *Judgments* (2d ed.) § 252. Its object, like any other method of direct review, such as appeal, a motion for a new trial or for a rehearing, or a bill of review, is to nullify the judgment in the same proceeding. Cf. Van Fleet, *Collateral Attack* § 2. In this respect it differs fundamentally from a collateral attack, in which the court is asked to disregard a prior judgment pleaded in bar of the relief sought, usually in a proceeding entirely independent of that in which the prior judgment was rendered.

The doctrine of *res judicata* has traditionally been regarded as inapplicable to a direct attack upon a judgment. 2 Freeman, *Judgments* (5th ed.) § 627, p. 1324. The courts have long enjoyed plenary power to vacate, modify, or correct all judgments during the term in which they were rendered (*Doss* v. *Tyack*, 14 How. 297, 303; *Basset* v. *United States*, 9 Wall. 38, 41; *Henderson* v. *Carbondale Coal and Coke Co.*, 140 U. S. 25, 40; *Zimmern* v. *United States*, 298 U. S. 167, 169–170) and to vacate judgments for lack of jurisdiction at any time, regardless of the expiration of the term (1 Freeman, *Judgments* (5th ed.) §§ 198, 226, 227; *Clark* v. *Arizona Mutual Savings and Loan Association*, 217 Fed. 640 (D. Ariz.), aff'd, 220 Fed. 1 (C. C. A. 9th); *United States* v. *Turner*, 47 F. (2d)

86 (C. C. A. 8th)).[20] In the federal courts the term of court as such is no longer significant. See Rules of Civil Procedure, 6 (c).[21]

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[20] *Accord:* 1 Black, *Judgments* (2d ed.), § 307; *In re Dennett*, 221 Fed. 350 (C. C. A. 9th), certiorari denied, 238 U. S. 628; *Mellon* v. *St. Louis Union Trust Co.*, 240 Fed. 359, 361 (C. C. A. 8th); *Macfarland* v. *Saunders*, 25 App. D. C. 438; *United States* v. *Ickes*, 84 F. (2d) 257 (App. D. C.); *Pollitz* v. *Wabash Ry. Co.*, 180 Fed. 950 (C. C. S. D. N. Y.), reversed on other grounds, 218 U. S. 312; *United States* v. *One Essex Touring Automobile*, 276 Fed. 28, 29 (N. D. Ga.); *Maury's Trustee* v. *Fitzwater*, 88 Fed. 768 (D. W. Va.); *Thomas* v. *American Freehold Land & Mortgage Co.*, 47 Fed. 550, 558 (C. C. S. D. Ga.); *United States* v. *Wallace*, 46 Fed. 569, 570 (D. S. C.); *cf. Humphries* v. *District of Columbia*, 174 U. S. 190.

[21] Rule 60 (b) of the Federal Rules of Civil Procedure, which provides for relief from a judgment or order within six months after the taking of the judgment or order, expressly states that this provision "does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding". The purpose of the rule was to extend, rather than to restrict, the right to direct relief, and it seems plain that it does not do away with the right to vacate at any time judgments void for want of jurisdiction. See 3 Moore's *Federal Practice* §§ 60.02–60.04.

Although the present motion was made before the effective date of the new rules (R. 5–6), it was still pending on September 16, 1938, when the rules came into force, and the judgment of the District Court was not entered until April 28, 1939 (R. 1103).

Rule 86 provides that the new rules shall govern all further proceedings in actions pending on the effective date of the rules, "except to the extent that in the opinion of the court their application in a particular action pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies."

To apply the doctrine of *res judicata* to direct review would be completely anomalous.[22] The very purpose of a rehearing or a new trial is to provide a redetermination of issues already litigated and adjudicated. The courts have, it is true, recognized a limitation as to the time in which revision may be had even in the same proceeding, but this limitation was founded on the view that after the expiration of the term in which judgment was rendered the proceeding passed beyond the court's control. *Bronson* v. *Schulten,* 104 U. S. 410, 415. It had no relation to the doctrine of *res judicata.* A general rule that an issue may be litigated but once would preclude reconsideration of the same proceeding whenever revision of the judgment were sought, whether a week after its entrance or a year. Moreover, as previously observed, the courts have always had power to vacate a judgment for want of jurisdiction at any time. If it be deemed desirable to modify past practice by limiting the time within

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[22] This Court has always distinguished between direct and collateral attack in applying the rule of *res judicata* and has never extended the doctrine to jurisdictional issues in cases of direct review. The cases of *Forsyth* v. *Hammond*, 166 U. S. 506, 517, *Des Moines Navigation and Railroad Co.* v. *Iowa Homestead Co.*, 123 U. S. 552, 557–559, and *Dowell* v. *Applegate*, 152 U. S. 327, 340, all involved collateral attacks made in independent proceedings. The recent decisions in *Stoll* v. *Gottlieb*, 305 U. S. 165, 172, 176, 177, and *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 376, 377, relied on by the court below, were expressly limited to collateral attack.

which judgments may be set aside on jurisdictional grounds, the doctrine of laches may properly be invoked in private litigation (*Bronson* v. *Schulten,* 104 U. S. 410, 414–418; *Societe Fonciere et Agricole des Etats Unis* v. *Milliken,* 135 U. S. 304, 308–309), although not where the Government is the moving party. Cf. *United States* v. *Summerlin,* 310 U. S. 414.

This Court has never had occasion to consider the question of the application of the doctrine of *res judicata* to a direct attack by motion to vacate. The decision in *Vallely* v. *Northern Fire & Marine Insurance Co.,* 254 U. S. 348, however, supports the view that a judgment may be set aside on motion to vacate for want of jurisdiction at any time. In that case an order adjudicating an insurance company an involuntary bankrupt was vacated on motion for want of jurisdiction. The Court observed (pp. 353–354):

> Courts are constituted by authority and they can not go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal.

The jurisdictional issue had not been litigated, it is true. The case was distinguished upon this ground in *Stoll* v. *Gottlieb, supra,* and also upon the further ground that the attack was by motion to vacate. 305 U. S. at 172. But in *Chicot County*

*Drainage District* v. *Baxter State Bank, supra,* a case similar on its facts to the *Vallely* case, a former adjudication was held conclusive even where the jurisdictional issue had not been litigated, leaving only the distinction in the method of attack. The *Chicot County* case did not purport to overrule the earlier decision, and in *Kalb* v. *Feuerstein, supra,* decided the same day, the *Vallely* case was twice cited as authoritative. 308 U. S. at 439. The decisions may be reconciled, it would seem, only on the assumption that the doctrine of *res judicata* has no application to a direct attack by motion to vacate.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment below should be reversed.

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## APPENDIX

The Trading with the Enemy Act of 1917, c. 106, 40 Stat. 411 (U. S. C. A., Title 50, Appendix) provides in part:

> SEC. 2. The word "enemy," as used herein, shall be deemed to mean, for the purposes of such trading and of this Act—
>
> (a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory, and any corporation incorporated within such territory of any nation with which the United States is at war or incorporated within any country other than the United States and doing business within such territory.
>
> * * * * *
>
> SEC. 7 (c).
>
> * * * * *
>
> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the

net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

SEC. 9 (a). Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in

equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

SEC. 9 (f). Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

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